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IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1971~~
1972

No. 71-829

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MICHAEL RODAK, JR., CLERK

LEILA MOURNING,

Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported at 449 F.2d 235 and appears in the Appendix at A. 40. The opinion of the District Court for the Southern District of Florida, which is not reported, appears in the Appendix at A. 32.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1971 (A.). The petition for certiorari was filed on December 23, 1971, and was granted on March 20, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Reserve Board acted within its statutory authority when it prescribed the four installment rule, 12 C.F.R. §226.2(k), defining "consumer credit" to include any credit payable in more than four instalments?

2. Whether the four installment rule, 12 C.F.R. §226.2(k), defining "consumer credit" to include any credit payable in more than four instalments, is constitutional?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

United States Code, Title 15, §1601, 82 Stat. 146 (1968):

§1601. Congressional findings and declaration of purpose:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

United States Code, Title 15, §1602(e), 82 Stat. 146 (1968):

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

United States Code, Title 15, §1602(f), 82 Stat. 146 (1968):

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

United States Code, Title 15, §1602(g), 82 Stat. 146 (1968):

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

United States Code, Title 15, §1604, 82 Stat. 148 (1968):

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions,

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as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

12 C.F.R. § 226.2(k):

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

12 C.F.R. § 226.2(l):

(l) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

12 C.F.R. § 226.2(m):

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

STATEMENT OF THE CASE

Petitioner is a seventy-three year old widow residing in Dade County, Florida. On August 19, 1969, she entered into a contract with the Family Publications Service, Inc. (hereinafter "FPS"), a Delaware corporation engaged in interstate commerce, for the purchase of certain maga-

since. The contract was the result of a telephone solicitation made to petitioner followed up by a solicitation at her home. Petitioner made an initial payment of \$3.95, and contracted to pay an equal amount for a period of thirty months. FPS agreed that petitioner would receive 4 magazines for a period of sixty months. (A. 6-7)

The contract, made on a standard printed form supplied by FPS, did not disclose to petitioner the total purchase price of the magazines—\$122.45. Nor did it disclose the balance due after the initial payment, \$118.50, or reveal other information or use terminology required by the Truth in Lending Act, 15 U.S.C. §§1601 et seq. Petitioner was required to state in writing information normally used in a credit check, such as her occupation and business address, and an agent of FPS wrote on the contract "Own 4 years", apparently indicating the period of time which petitioner had owned her home. (A. 7)

The sale of magazine subscriptions under similar circumstances is agreed to be FPS's sole business and source of income. FPS contracts with the magazine publishers to supply magazines directly to its customers. What portion of a subscriber's payments are paid to the publishers and what portion retained by FPS is not disclosed by the record.

Shortly after entering into this contract petitioner, apparently realizing for the first time the large amount of money involved, refused to make further payments. Thereafter petitioner received at least five dunning letters from FPS demanding at first a resumption of monthly payments and then payment of the full \$118.50 balance. The letters stressed that petitioner had "a credit account",

warned of the "embarrassment" of having her name appear on a "monthly delinquent report", and threatened "expensive and unpleasant" legal action. (A. 11-24)

On April 23, 1970, petitioner, then represented by the Legal Services Senior Citizens Center, brought this action in the United States District Court for the Southern District of Florida alleging that the contract violated the Truth in Lending Act. Jurisdiction of the District Court was invoked under 15 U.S.C. 1640(e) providing for federal jurisdiction of actions arising under the Act. Petitioner demanded \$100 in statutory damages, legal fees, and costs. (A. 2-5) FPS urged, *inter alia*, that it was not required to make any disclosures because the transaction with petitioner did not involve a finance charge and was thus not covered by the Act. Petitioner maintained that she was not required to prove that the \$112.45 total cost included a hidden finance charge because the applicable regulation, 15 C.F.R. §226.2(k), required disclosure whenever, as here, the contract was payable in four or more instalments.

In connection with the proceedings in the District Court petitioner filed affidavits of the Director and an Inspector of the Consumer Protection Division of Metropolitan Dade County. The affidavits stated that the Consumer Protection Division had received over 100 complaints about FPS's practices, that to entice potential subscribers FPS falsely represented it was giving away free 5 year subscriptions to "Life" magazine, that those entering into contract with FPS would not have done so had they known the full contract price, that FPS refused to permit subscribers to cancel contracts and used threatening and harassing tactics to enforce them. The affidavit of the Director further states that on July 29, 1970, defendant and two of its employees were convicted

in Dade County Criminal Court of misleading advertising and that FPS was ordered to cease doing business in the State of Florida. (A. 24-31)

On November 27, 1970, the District Court held that the four instalment rule set out in section 226.2(k) was valid and applicable to the facts of this case, and granted petitioner's motion for summary judgment for \$100 statutory damages plus costs and a reasonable attorney's fee. (A. 32-35) On September 27, 1971, the Court of Appeals reversed on the sole ground that the four instalment rule contained in Regulation §226.2(k) was invalid and that FPS was therefore not required to make any disclosures. The Court of Appeals held that the Board lacked the authority to prescribe the four instalment rule, and that the rule was unconstitutional because it was a conclusive presumption.

SUMMARY OF ARGUMENT

I.A. The four instalment rule, 12 C.F.R. §226.2(k), was properly prescribed by the Federal Reserve Board to prevent circumvention and evasion of the law. Although the Truth in Lending Act applies regardless of whether a finance charge was imposed in any particular credit transaction, the specific disclosure provisions are limited to creditors who regularly extend credit and impose a finance charge for it. 15 U.S.C. §1602(f) The four instalment rule requires disclosures whenever a credit transaction involves more than four instalments, regardless of whether the creditor regularly imposes finance charges.

The Board has explicitly found that the four instalment rule is essential to prevent evasion or circumvention

of the law. Without it creditors will raise their prices rather than openly imposing a finance charge, thus burying the cost of the credit in their prices and avoiding coverage by the Act. Consumers would not even be able to readily discover the hiding of such a finance charge because the merchant, as in this case, could refuse to disclose the total purchase price of the goods. The Board's finding that the four instalment rule is necessary to prevent evasion of the law is subject to only limited judicial review, and was not questioned by the court below.

Since the four instalment rule is necessary and proper to prevent evasion, it is within the Board's power. Section 1604, 15 U.S.C., authorizes any regulation or adjustment needed to prevent evasion, and the four instalment rule is clearly within that class. In view of the complexity of credit transactions and the ingenuity of creditors, Congress enacted section 1604 so that the Board could, where proper, go beyond the literal disclosure requirements of the Act. This Court has specifically sanctioned the power of administrative agencies to augment the substantive provisions of statutes they are administering to assure effective enforcement, both when regulations to prevent evasion were specifically authorized by statute, *Gannco v. Walling*, 324 U.S. 244 (1945), and when they were not, *United States v. Foster*, 233 U.S. 515 (1914).

I.B. The four instalment rule was within the Board's power to prescribe legislative regulations to carry out the purpose of the Truth in Lending Act. The expressly stated purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

15 U.S.C. §1601. Section 1604 explicitly authorized the Board to prescribe regulations to carry out this "purpose." If the Act contained only these provisions the four instalment rule would clearly be a valid application of the legislative rule making authority contained in these sections. 1 *Davis on Administrative Law*, Chapter 5.

This Court has repeatedly recognized that the presence of substantive provisions in a statute does not negate an express grant of legislative rule making authority. *Thorpe v. Housing Authority, of Durham*, 393 U.S. 268 (1969). In this case the language of section 1604 is clearly not limited to interpretive regulations, and the legislative history of the statute indicates that Congress rejected a narrower wording.

The four instalment rule does not conflict with any specific substantive provision of the Act. The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave regulation of the transaction to the Board. *American Trucking Association v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 408-410 (1967). The transactions covered by the four instalment rule are not among those expressly *exempted* from the Act by 15 U.S.C. §1603. The rule actually complements the substantive provisions by preventing evasion thereof.

II. The four instalment rule is constitutional. Assuming *arguendo* that the Act is primarily concerned with creditors imposing finance charges, Congress or the Board acting on its behalf could regulate a class of transactions such as those with more than four instalments even though some of the creditors covered might not impose

hidden finance charges. The constitution allows regulation of such classes of transactions even though some individual cases innocuous in themselves are covered. *Eckel v. Ambler Realty*, 272 U.S. 365 (1926).

Although this Court has at times criticized conclusive presumptions, it has never expressly invalidated a statute merely because it contained such a presumption. *Heiner v. Donnan*, 285 U.S. 312 (1932). The consensus of modern decisions is that a conclusive presumption merely states a substantive rule of law, and is valid so long as the substantive rule itself is not subject to constitutional attack. *Ellis v. Henderson*, 204 F.2d 173 (5th Cir., 1953). Even if there were a constitutional ban on conclusive presumptions, it would necessarily be restricted to statutes or regulations which establish such a "presumption" in that or other evidentiary terms. *Bowers v. United States*, 226 F.2d 424 (5th Cir., 1955). Since the four instalment rule does not purport on its face to create a presumption or any other type of evidentiary rule, it is valid.

1. THE FEDERAL RESERVE BOARD WAS AUTHORIZED TO PRESCRIBE THE FOUR INSTALMENT RULE

The Truth in Lending Act was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. The Act requires, *inter alia*, that certain specified disclosures be made by creditors in all consumer credit contracts. 15 U.S.C. §§1631-39. The Federal Reserve Board is directed to prescribe regulations under the Act, and

enforcement is provided for by a variety of administrative agencies and by private litigation. 15 U.S.C. §§1604, 1607, 1640.

The instant action was brought by petitioner as a "private attorney general" to secure enforcement of the law. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y., 1971) FPS concedes that it did not disclose to petitioner the total purchase price of the magazines or several other items of information, or use certain specified terminology, required in transactions falling under the Act and regulations.¹ The only issue in this case is whether the contract between petitioner and FPS is the type of transaction in which disclosures are legally required. Since the transaction is not covered by the substantive provisions of the statute but is covered by the regulation known as the four instalment rule, the case ultimately turns on the validity of that regulation.

The statutory disclosure requirements are generally applicable to any extension of "credit" by a "creditor" to a "consumer", each of the quoted terms being defined by the statute and regulation. It is conceded that petitioner is a consumer. The statute defines "credit" and "creditor" as follows:

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

¹Omitted information included the difference between the total price and the down payment. 15 U.S.C. 1638(a)(2) and (3) The terminology required is set out in 12 C.F.R. 226.8 Standardized terminology is required to facilitate consumer comparison of information in comparable form.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or service, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization. 15 U.S.C. §1602

The regulation defines "consumer credit" and "creditor" in this manner:

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

...

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.
12 C.F.R. §226.2

Although the statutory and regulation definitions are generally similar, there is one significant difference on which this case turns. The statute defines "creditors" to those who, *inter alia*, regularly impose a finance charge. If the lender or merchant regularly imposes such charges, he must make the required disclosures in *all* of his credit transactions whether or not they involve a finance charge. Under the regulation this prerequisite of a regular imposition of a finance charge is deleted; instead the disclosure requirements are imposed if in the particular

transaction a finance charge is or may be imposed or the debt is or may be payable in more than four instalments. This latter standard is known as the four instalment rule. The regulation is at once broader and narrower than the statute. The statute covers, but the regulation exempts, a transaction not involving a finance charge or more than four instalments by a creditor who regularly imposes finance charges. Conversely the statutory definitions do not reach, though the regulation does cover, a transaction which does or might involve a finance charge or more than four instalments involving a creditor who does not regularly impose finance charges.

In the instant case FPS concedes that the contract was payable in more than four instalments, but claims that it does not regularly impose finance charges. FPS admits that it may have charged less for subscriptions that were paid for in cash.² FPS urges that under these circumstances the Act does not require it to make any disclosures and that it was entitled to refuse to tell petitioner the total cost of the magazines sold. FPS maintains that the four instalment rule, in as much as it purports to require disclosures by creditors who do regularly impose finance charges, is invalid. It is on this latter contention that this case turns.

²Brief of Respondent in Opposition to Certiorari, p. 9, note.

A. THE FOUR INSTALMENT RULE IS WITHIN THE BOARD'S POWER TO PRESCRIBE REGULATIONS AND MAKE ADJUSTMENTS TO PREVENT CIRCUMVENTION OR EVASION OF THE LAW.

Section 1604, 15 U.S.C., which authorizes the Federal Reserve Board to prescribe regulations, provides:

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The four instalment rule is founded upon an explicit and reiterated finding by the Federal Reserve Board that such a rule is essential to prevent wholesale evasion of the Act. In an opinion letter issued eight days after the regulation became effective, Vice-Chairman Robertson of the Board explained:

The Board considers this to be a rather significant part of the Regulation, intended as a deterrent to those who might cease to charge a finance charge but, instead, inflate their so-called "cash" price and thus avoid compliance. 4 C.C.H. Consumer Credit Guide, ¶30,434.

Six months later, on December 9, 1969, Governor Robertson wrote:

We believe that without this general provision [the four instalment rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged by Truth in Lending. In order to prevent this ironic

result we felt it imperative to establish the more than four payment rule. 4 C.C.H. Consumer Credit Guide ¶ 30,228.

Again on March 3, 1970, Governor Robertson explained:

The Board felt that it was imperative to include transactions involving more than four instalments under the Regulation since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Consequently we believe that this is a rather important part of the Regulation. . . . 4 C.C.H. Consumer Credit Guide, ¶ 30,320.

See also Hearings Before the Consumer Subcommittee of the House Banking and Currency Committee, 91st Cong., 1st Sess. Part II, p. 375 (1969).

In upholding the instant regulation under similar circumstances in *Strompolos v. Premium Readers Service*, 326 F. Supp. 1100 (N.D. Ill., 1971), Judge Will concurred in the need for the rule:

We agree with the Federal Reserve Board's evaluation of the necessity of this type of regulation.

The facts of this particular case may very well demonstrate why the four installment rule is not only sensible but also necessary to prevent the Truth in Lending Act from being a hoax and a delusion upon the American public. Although the defendant contends that it charges the same unitary price for both credit and cash sales, it is readily apparent that a seller in any industry which sells primarily or almost exclusively on a long term credit basis could easily set a theoretical unitary cash and credit price which he knows no one will pay in less than four installments and thus exempt himself and his industry from the coverage of the Act. . . .

It is most logical that the Federal Reserve Board would plug a loophole by which a substantial portion of long term credit dealers could escape from the Act's coverage. Neither the law, the Federal Reserve Board nor the courts are so simplistic as to believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single "cash or credit" price knowing full well that the great bulk of its customers will never pay in less than, for example, thirty months.

... Were the Board not to have promulgated this rule nor the courts to sustain it, the Truth in Lending Act might never achieve its stated goals. 326 F. Supp. at 1103-04.

Without the four instalment rule there would be little if any incentive to prevent merchants from reverting with vengeance to the practices common prior to the passage of the Act, disclosing neither finance charges, interest rates, nor total prices for their goods. The success of such a scheme of evasion will give merchants selling on credit a substantial and unwarranted competitive edge over banks and other lenders who have no price in which to bury their finance charges. Such results would have a particularly adverse effect on the poor. Burying finance charges and advertising 'free credit' was especially common prior to 1969 in ghetto neighborhoods, and low income consumers are particularly susceptible to these practices because they are least likely to ask the total cost of some good or service so long as the monthly payments seem within their reach. See Comment, "Consumer Legislation and the Poor," 76 Yale L.J. 745, 762-63 (1967).

The difficulty of proving that a creditor who claimed to give free credit regularly hid finance charges in a

substantial number of transactions might well exceed the limited resources of private litigants and administrative agencies. Such an inquiry might well involve an investigation of the creditor's entire business, financial arrangements and bookkeeping procedures over a period of several years. Neither the Act nor the regulation sets out standards for deciding when such finance charges are hidden. A consumer who is not even told the total purchase price has no way of knowing from the unusually high price of the goods that a hidden finance charge may be involved. The consumer's need for information as to the price of the goods and the finance charge, if any, is the same whether or not the credit imposed finance charges in other cases.

In view of these problems, the four instalment rule is clearly within the authority of the Board to prescribe regulations or adjustments necessary or proper to prevent circumvention or evasion of the law. 15 U.S.C. §1604. There is no provision in §1604 limiting the regulations to mere restatements and interpretations of the provisions of the statute. On the contrary, the language of the section evinces a contrary intent.

The wording of section 105 of the Act [15 U.S.C. §1604] clearly indicates, not only that Congress delegated to the Board authority to issue regulations to effectuate the purposes of the Act, but that Congress also went further and granted the Board the power to promulgate, at its discretion, regulations necessary to prevent circumvention of the Act. The use of the word "circumvention" in the Act signifies that Congress was aware that some creditors who would otherwise fall within the purview of the Act might, after passage of the Act, attempt to restructure their consumer business relations in such a manner that they might technically avoid the wording of the Act.

Along with the recognition of this potential for evasion, Congress also recognized the equally obvious fact that no legislative body could conceivably put into a workable piece of legislation regulations and restrictions covering every imaginable business transaction wherein credit may be involved. Consistent with other complex regulatory legislation, Congress granted an administrative agency the power to apply the basic purposes of the Act to the everyday world. Not only did Congress order the Federal Reserve Board to promulgate regulations to effectuate the purposes of the Act, it also took the further affirmative step of enabling the Board to reach creditors, who in the Board's judgment, were attempting to circumvent or evade the Act by structuring their credit activities to fall a fine line outside the Act. *Strompolos v. Premium Readers Service*, 326 F.Supp. 1100, 1103-04 (N.D. Ill., 1971)

Section 1604's reference to "adjustments and exceptions" clearly contemplates that the lines drawn by the statute itself may be altered, and its scope both restricted by exceptions and extended by adjustments. Nothing in the legislative history of the Truth in Lending Act reveals any Congressional intent to leave the Board powerless to deal with evasion such as that which the four instalment rule was designed to prevent.

This Court has recognized that the authority of an administrative agency to apply and enforce a statute must at times include authority to prescribe regulations going beyond the literal command of the statute in order to prevent evasion. A regulation comparable to the four instalment rule was upheld by this Court under virtually identical circumstances in *Gemesco v. Walling*, 324 U.S. 244 (1945). *Gemesco* arose under the Fair Labor

Standards Act of 1938,³ which prohibited certain child labor and established minimum wages for various industries. The Administrator of the Wage & Hour Division of the Department of Labor was authorized to issue orders defining the industries and applicable rates and setting such terms and conditions as he found "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." 29 U.S.C. §208. The Administrator issued an order prohibiting industrial homework after finding that such a prohibition was necessary to maintain the wage rates and prevent evasion of the limitations on child labor. 324 U.S. at 249-254. The validity of the regulation was challenged on the ground that the statute itself contained no such requirement. The Court upheld the regulation nonetheless, noting that without it the statute might well be a dead letter in the industry involved:

The case therefore comes down squarely to whether or not minimum wages may be effectively prescribed and required in this industry. If homework can be prohibited, this is possible. If it cannot, the floor provided by the order cannot be maintained and, what is more important, it inevitably follows that no floor . . . can be maintained.

In this light petitioners' position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in these terms. It comes to that. So to state it is to answer it. The industry is covered by the Act. . . . Congress by stating expressly its primary ends does not deny resort to the means necessary to achieve them. Mention of child labor therefore gives no ground to infer, from failure

³ 52 Stat. 1060, 29 U.S.C. §§201 *et seq.*

expressly to mention homework, that the latter was not included within the general language which comprehends all necessary means to achieve the Act's primary ends, 224 U.S. at 254-262.

See also *United States v. Foster*, 233 U.S. 515 (1914).

In the instant case the Board's authority is even broader than that in *Genesco*, since here regulations to prevent evasion need not be "necessary" but merely "proper." 15 U.S.C. §1604. Inasmuch as the four instalment rule is both necessary and proper to avoid circumvention of the Act, the Board acted within its statutory authorization in prescribing it.

B. THE FOUR INSTALMENT RULE WAS WITHIN THE BOARD'S POWER TO PRESCRIBE LEGISLATIVE REGULATIONS TO CARRY OUT THE PURPOSE OF THE TRUTH IN LENDING ACT.

Section 102 of the Truth in Lending Act, 15 U.S.C. §1601 sets out succinctly the congressional purpose behind the Act:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.⁴

⁴The statement of purpose makes no reference to creditors, statutorily defined or otherwise, and thus includes all credit

Section 105 of the Act, 15 U.S.C. §1604, provides that "[t]he Board shall prescribe regulations to carry out the purposes of this title." (Emphasis added.) This grant of authority is at least as far reaching as grants to other agencies which this Court has described as conferring "broad rule-making powers." *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 277, n. 28 (1969).

If the Act contained only these two provisions, the validity of the four instalment rule would be beyond question. The Congress may provide for the establishment of a regulatory scheme by enunciating a general purpose or goal and authorizing an agency to promulgate "legislative rules" aimed at achieving that end. See generally 1 *Davis on Administrative Law*, Chapter 5. A regulation so enacted does not constitute an addition to the statute so long as it is within the statutory purpose. See, e.g., *United States v. Foster*, 233 U.S. 515 (1914). Section 1601 provides a sufficiently definite standard for the regulations that the authority of the Board set out in section 1604 does not constitute an invalid delegation of legislative authority. Compare *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920). To sustain a particular regulation such as the four instalment rule, it is only necessary that it be "reasonably related to the purposes of the enabling legislation under which it was promulgated." *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280-81 (1969). In the instant case the Board found that, unless disclosures were required in credit transactions involving more than four instalments,

transactions such as this one regardless of whether the creditor falls within the statutory definition of "creditor" in 15 U.S.C. §1602(f).

the Act's policy of requiring disclosure of credit costs would be frustrated by creditors who buried those charges in their so-called "cash price," and then, as here, refused to disclose even that total price. See pp. 14-16, *supra*. Even where the credit really is in some sense free, it is useful for consumers to be told that in terms comparable to those used by other creditors to make clear the cost differences, and to be informed clearly and in detail as to the total cost of the goods involved and the repayment conditions so as to avoid over-extending themselves financially. The Board's finding that this regulation will advance the general purposes of the Act is not subject to review absent a clear showing of abuse of discretion. *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

The Truth in Lending Act is not, of course, limited to a general statement of purpose and enforcement provisions. The statute also includes several sections establishing substantive rules requiring the disclosure of particular information which must be disclosed in specified consumer credit transactions. 15 U.S.C. §§1631-1639. With regard to these substantive provisions and the ancillary sections dealing with definitions, section 1604 of the Act also confers upon the Board the power to write interpretive regulations. See 1 *Davis on Administrative Law*, §5.03. The fact that the Act contains substantive provisions and authorizes the Board to issue interpretive regulations does not necessarily negate the grant of legislative rule making power to carry out the Act's more broadly phrased statement of purpose. This Court has repeatedly affirmed the authority of federal agencies to promulgate legislative rules pursuant to Acts which, in addition to authorizing such rules, also contained specific substantive provisions.

In *Thorpe v. Housing Authority of Durham*, 393 U.S. 462 (1969), this Court upheld the power of the Department of Housing and Urban Development under the Housing Act of 1949 to issue a regulation furthering the Act's general goal of providing "a decent home and a suitable living environment for every American family," 42 U.S.C. §1441, although the Act contained some twenty substantive provisions specifying particular ways of achieving that goal. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court upheld a regulation based on the Commission's authority to issue rules in "the public interest," 47 U.S.C. §§303, 303(r), 307(a), 309(g), 307, 309(h), notwithstanding the many substantive provisions also included in the Federal Communications Act.

Regulatory measures such as the Truth in Lending Act are plainly distinguishable from the tax cases relied on by the Court of Appeals below. See, e.g., *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87 (1959); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1935). Unlike the instant statute and other regulations which embody a broad statement of purpose which an administrative agency is directed to pursue, the Internal Revenue Code contains no general pronouncement of Congressional intent to tax internal revenue, but only specific revenue measures. And unlike section 1604's command that the Federal Reserve Board prescribe regulations "to carry out the purposes" of the Truth in Lending Act, the Internal Revenue Code authorizes the Secretary more narrowly to prescribe rules and regulations "for the enforcement of this title." 26 U.S.C. §7805(a). It has been understood from the beginning that section 7805 does not authorize the Secretary to issue legislative rules aimed at some

general purpose, but merely to pronounce interpretation of the specific provisions of the tax code. 1 *Davis on Administrative Law*, §5.03, p. 300.

Both the terms of the statute and its legislative history indicate that Congress intended to give the Board broad legislative rule making authority. The terms of §1604 itself clearly indicate that Congress had more than interpretive rules in mind. The Board is directed to prescribe regulations to carry out not merely any particular provision nor generally the Act as a whole; the authorization refers specifically to the "purpose" of title. By contrast, the grant of rule making power in *Thorpe* and *Red Lion* was to carry out "the provisions" of the Act. See 42 U.S.C. §1408; 47 U.S.C. §303. The statute requires the Board to set up an advisory commission of consumers and creditors, 15 U.S.C. §1609, and contemplates that it will obtain the views of other federal agencies in carrying out its functions. 15 U.S.C. §1608. These provisions for advice and consultation would make little sense if the Board were merely to interpret the Act's substantive provisions, but are readily comprehensible as aids to the Board's broader policy making responsibility to assure a meaningful disclosure of credit terms. Section 1602(g), 15 U.S.C., incorporates by reference into the statute's requirements the regulations issued by the Board under a substantive provision of the Truth in Lending subchapter or under the subchapter itself.² It cannot be presumed that Congress, having expressly given the Board broad legislative rule making power in section 1604, intended to

²"Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question." 15 U.S.C. §1602(g)

withdraw that power by implication when it enacted the substantive provisions which followed.

The Senate version of the Truth in Lending Act, S. 5, 90th Cong., 1st Sess., 113 Cong. Rec. 18179-18182 (1967), contained a statement of purpose similar to that ultimately enacted.⁶ And section 5 of the bill provided broadly "(a) The Board shall prescribe regulations to carry out this Act, . . . (c) Any regulation prescribed hereunder may contain such classifications and differentiations and may provide for such adjustments and exceptions from this Act . . . as in the judgment of the Board are necessary or proper to effectuate the purposes of the Act. . . ." The House version, H.R. 11601, 90th Cong., 1st Sess., 114 Cong. Rec. 1582-86, 1852-1857, was more narrowly cast. H.R. 11601 set out in section 203, entitled "Disclosure of Finance Charges; Advertising," detailed disclosure requirements paralleling those in the final bill. Section 204, however, provided "(a) The Board shall prescribe regulations to carry out *section 203* . . . (c) Any regulation prescribed under this section may contain such classifications and differentiations and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of *section 203* . . ." (Emphasis added.) Section 203 itself contained

⁶Section 2 of the Senate bill provided:

"The Congress finds and declares that economic stabilization would be enhanced and that competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the costs thereof by consumers. It is the purpose of this Act to assure a full disclosure of such costs with a view to promoting the informed use of consumer credit to the benefit of the national economy."

no statement of purpose. In conference the Senate version of the regulation authorization section was accepted by the conferees, and its language altered to refer specifically to the Act's statement of purpose. Although the Conference Report did not comment on this, it described the Board's power under the Act as "rule making" rather than interpretation. Conference Report No. 1397, 90th Cong., 2d Sess.; 114 Cong. Rec. 14383 (1968). To limit the authority of the Board to interpreting and applying the substantive provisions of the Act would be to subject the Board to the very limitation suggested by the House and ultimately rejected by Congress.

The substantive provisions of the Act, which do not generally preempt Board legislative regulations over and above those statutory requirements, do not preclude the specific provision set out in the four instalment rule. The four instalment rules does not conflict with any specific provision or policy of the Act. Compare *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 722-725 (1963). The worst that could be said of this regulation is that it applies to a transaction not regulated specifically by the substantive provisions of the Act. But this cannot be enough to void a legislative regulation, for it is equally true of any legislative regulation pursuant to a statute which also contains substantive provisions. On the contrary, this Court has repeatedly rejected the argument that the absence of a specific statutory provision indicates a Congressional intent to preclude administrative regulation to the same effect. *American Trucking Association v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 408-410 (1967); *United States v. Pennsylvania R.R. Co.*, 323 U.S. 612, 616 (1945). In *United States v.*

Pennsylvania R.R. Co., the Interstate Commerce Commission had directed railroads to interchange their cars with connecting water transportation systems, a requirement admittedly not set out in the Interstate Commerce Act itself. The Court upheld the regulation, explaining:

There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in [February 4] 1887, 24 Stat. 379, c 104, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. 323 U.S. at 616.

The presumption that the absence of a specific statutory requirement does not reflect a legislative intent to bar such administrative action is buttressed in this case by the language and legislative history of the statute. If creditors not regularly imposing finance charges are not covered by the substantive provisions, that is because of the omission of such creditors from the definition of "creditor" in section 1602. In sharp contrast to this mere omission, section 1603 affirmatively and expressly exempts certain transactions from the entire Act: transactions for business or commercial purposes, transactions in securities or commodities by a registered broker-dealer, transactions other than for real property involving more than \$25,000, and transactions under

public utility tariffs.⁷ It would clearly be beyond the authority of the Board, for example, to promulgate a legislative rule requiring disclosures in a business loan.⁸ Creditors not regularly imposing finance charges are not among those as to whom the Act expressly "does not apply," they are merely omitted from coverage by the substantive provisions. This difference in treatment indicates a different Congressional intent: not to absolutely exempt such creditors, but to have them regulated only to the extent that the Board found proper in the exercise of its legislative rule making responsibilities. The legislative history of the definition of "creditor" reveals no affirmative interest on the part of the Congress in excluding creditors who do not impose finance charges; neither the committee reports nor the summary of the Act on the floor of the Senate

⁷ §1603: Exempted transaction

This title does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds \$25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

⁸Of course the Board could regulate putatively business loans under circumstances where it found a substantial danger that consumer loans would be recast as business loans to evade the Act.

mentioned the omission of creditors not imposing finance charges.⁹

The four instalment rule, rather than frustrating the specific provisions of the Act, complements them. By covering transactions involving more than four instalments, the rule inhibits creditors from evading the disclosure requirements of sections 1637 and 1638 by hiding the finance charge in his prices and then, as here, refusing to reveal those total prices to the consumer. See pp. 14-16, *supra*. Section 1602(g) defines credit sale to include a lease or bailment where the cost of the use equals or exceeds the value of the goods or the bailee, or lessee has the option to become the owner of the property for a nominal consideration. The purpose of this section could be frustrated by a creditor who engaged exclusively in such sham lease transactions, since he could not be said, absent special proof, to regularly impose finance charges. Section 1635 gives the consumer three days to rescind credit transactions involving a security interest on his home. This provision was added on the House floor at the instance of Congressman Cahill to protect consumers who were losing their homes when they defaulted on unrelated credit contracts. 114 Cong. Rec. 1611 (1968).¹⁰ This provision, too, could be

⁹H.R. Report No. 1040, 90th Cong., 1st Sess., (1967), 23-24; S. Rep. No. 392, 90th Cong., 1st Sess., 13 (1967); 113 Cong. Rec. 18403 (90th Cong., 1st Sess., 1967).

¹⁰Congressman Cahill's discussion of the problem at no point suggested that the creditors involved were openly imposing charges, or that it would matter whether they were.

"I am sure that most of the Members are aware of the extent to which vicious secondary mortgage schemes have victimized homeowners in the District of Columbia.

rendered nugatory by burying the finance charges in the price of the goods sold. The four instalment rule effectively forestalls such schemes to evade sections 1602(g) and 1635. The use of legislative regulations to prevent evasion of substantive statutory provisions has of course been commended by this Court. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 382-3 (1969).

The extent of judicial review of legislative regulations such as the four instalment rule is limited. Section 1604 charges the Board with the task of devising rules to effectuate the policies of the Act. The relation of regulations to policy is peculiarly a matter of administrative competence. In fashioning regulations to secure the success of those policies, the Board must draw on enlightenment gained from experience. The regulation

On numerous previous occasions I have pointed out to the Members that New Jersey and Pennsylvania homeowners have similarly been defrauded. The pattern of this unscrupulous fraud is generally not too complex, but finds its success primarily in the anxiety and financial need of homeowners who are ill-prepared to glean the truth from the many representations made to them by mortgage lenders. Generally, the homeowner desiring to borrow money is confronted by deceptive contracts, hidden finance charges, and misrepresentations of the considerations he is to receive and the financial obligations he is to assume.

Frequently, the misrepresentations are made by newspaper advertisements. In other instances, the misrepresentations are made directly to the borrower by the mortgage discount lender or a broker who offers to arrange home improvement repairs or consolidation of all the homeowner's debts into 'one easy monthly payment.'

In all cases, the homeowner is hurried and rushed through the transaction by glib and reassuring talk and in many cases he is never informed nor aware that his home is being made subject to a mortgage." 113 Cong. Rec. 18403.

should not be disturbed unless it can be shown that the four instalment rule is a patent attempt to achieve ends other than a meaningful disclosure of credit terms. Compare *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). Such a showing is not possible in this case. The Board manifestly interpreted the Act to authorize the instant regulation. That interpretation is entitled to great deference by virtue of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969), "particularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

II. THE FOUR INSTALMENT RULE IS CONSTITUTIONAL

Congress acted constitutionally when it delegated to the Federal Reserve Board the authority to write regulations such as the four instalment rule. The Truth in Lending Act clearly sets out the purpose of the law and the regulations thereunder, 15 U.S.C. §1601, and details the general method by which this purpose is to be achieved. Both the purpose and its method of achievement are specified with sufficient exactness to make clear their meaning and limitations. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 574 (1939). The statute here is substantially more precise than other delegations of authority approved by this Court.

Compare, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Yakus v. United States* 321 U.S. 414 (1944).

The stated purposes of the Act clearly encompass the making of disclosures in all transactions regardless of the status of the creditor. Even if the Act and Board were primarily concerned with creditors who regularly impose finance charges, Congress or the Board could impose disclosure requirements on all transactions involving more than four instalments even though some of the transactions in that class may not involve hidden finance charges. This Court has long held that a regulatory scheme aimed at a particular type of object or transaction may embrace a penumbra which goes beyond such objects or transactions in order to make the regulation effective. In *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), this Court upheld a zoning law which excluded all industry from certain areas, regardless of whether a particular industry might not be offensive or dangerous.

[T]his is no more than what happens in respect of many practice-fortbidding laws which this court has upheld, although drawn in general terms to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw*, 248 U.S. 297, 303; *Pierce Oil Corp. v. Hope*, 248 U.S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. 272 U.S. at 388-89.

See also *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946); *Samuels v. McCurdy*, 267 U.S. 188 (1925);

Hebe v. Shaw, 248 U.S. 297 (1918); *Purity Extract & Tonic Company v. Lynch*, 226 U.S. 192 (1912); *Murphy v. California*, 225 U.S. 621 (1912); *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908); *Ah Sin v. Wittman*, 198 U.S. 500 (1905); *Booth v. Illinois*, 184 U.S. 425 (1902).

In the instant case the four instalment rule, though it may require disclosures by creditors who do not hide finance charges in their prices, is essential to prevent evasion by creditors who do, and to provide consumers with credit information in a readily comparable form even where the seller maintains that the credit is "free." See pp. 00-00 *supra*. The undisputed power of Congress to promote economic stabilization, competition, and the informed use of credit by requiring disclosure of credit terms would be meaningless if Congress could not, by statute or through the Federal Reserve Board, regulate a class of transactions such as that covered by the four instalment rule, in which there was a substantial danger of evasion, merely because some of the creditors involved might not regularly impose finance charges.

The decisions of this Court regarding conclusive presumptions, relied upon by the Court of Appeals below, are inapplicable to the instant case. The leading decision of that line is *Helner v. Donnan*, 285 U.S. 312 (1932), where the Court ruled unconstitutional a provision that any gift made within two years of the death of the donor would be "deemed and held to have been made in contemplation of death" and thus subject to the federal estate tax. Revenue Act of 1926, § 302(c), 44 Stat. 9, 70. *Helner* held that the statute involved was a conclusive presumption, and criticized it as a rule of evidence because it denied the taxpayers the right to prove the facts of his case and unreasonably excluded

consideration of every fact tending to show the real motive of the donor. 285 U.S. at 327-329. Assuming *arguendo* that *Hebner* enunciated a general constitutional ban on conclusive presumptions, it is clearly distinguishable from the instant case. *Hebner* and all the other decisions of this Court regarding statutory presumptions have been limited to laws which purport on their face to be rules of evidence.¹¹ This limitation is

¹¹ See e.g., *Turner v. United States*, 396 U.S. 398 (Possession of cocaine "deemed sufficient evidence" to authorize conviction for knowing possession of illegally imported product) (1970); *Leary v. United States*, 395 U.S. 6 (Possession of marijuana "deemed sufficient evidence" to authorize conviction for knowing possession of illegally imported product) (1969); *United States v. Romano*, 382 U.S. 136 (Presence in location of illegal working still "deemed sufficient evidence" of carrying on illegal distillery business) (1965); *United States v. Gentry*, 380 U.S. 63 (Presence in location of illegal still "deemed sufficient evidence" of possession of illegal still) (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 215 (Failure to comply with any federal compulsory service law while outside the United States "shall raise the presumption" that departure from the country was to avoid service and training) (1963); *Tor v. United States*, 319 U.S. 463 (Possession of firearm or ammunition by convict "presumptive evidence" of possession of firearm or ammunition which has been transported in interstate commerce) (1943); *Boulder Petroleum Co. v. Superior Court*, 284 U.S. 8 (Release of natural gas into air "prima facie evidence" of unreasonable waste of gas) (1931); *Casey v. United States*, 276 U.S. 413 (Possession of opium "prima facie evidence" of purchase in judicial district in which located) (1928); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119 (Fraudulent intent "presumed" if certain promises made in connection with a contract but not kept) (1927); *Yee Hem v. United States*, 268 U.S. 178 (Concealed possession of opium "deemed sufficient evidence" of knowing concealment of opium with knowledge it was illegally imported) (1925); *Hawai v. Georgia*, 258 U.S. 1 (Possession of premises on which distillation apparatus found "prima facie evidence" of knowledge of existence thereof) (1962).

essential in the case of conclusive presumptions because any substantive rule of law could otherwise be subject to attack by analyzing that rule as a disguised conclusive presumption. Thus one might urge that the whole of the Truth in Lending Act, requiring disclosures to all consumers, is invalid because, though its purpose is to make consumers aware of the cost of credit, it conclusively presumes that all consumers lack that information and does not allow a creditor to prove that a particular consumer knew the cost of his credit from some other source. No substantive rule of law would be safe from such a destructive analysis, and a prohibition against conclusive presumptions construed in this manner would be absolutely inconsistent with the well established penumbra cases. *Supra*, pp. 32-33.

This Court has not only limited the application of its rules regarding presumptions to explicitly evidentiary statutes, but when invalidating a presumption has repeatedly suggested that Congress would have achieved the same effect by enacting a substantive rule instead. See e.g., *Leary v. United States*, 395 U.S. 6, 54 (1969); *Turner v. United States*, 396 U.S. 398, 430 (opinion of Justice Douglas) (1970).

This limitation on *Heiner* is plainly applicable to the instant case. Regulation §226.2(k) does not state that the extension of credit involving more than four installments shall create a "presumption," or be treated as "evidence," that the creditor regularly hides or imposes finance charges. On the contrary, the regulation purports to do no more than define the phrase "consumer credit." The Board's official explanation of this regulation speaks of the danger of evasion not of evidentiary concerns. This Court's self-imposed obligation to interpret laws and regulations whenever possible to uphold their

constitutionality requires that the instant regulation be construed as substantive rather than evidentiary. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U.S. 1, 30 (1937). Under the circumstances it would be entirely inappropriate for the Court to treat the regulation as an evidentiary rather than a substantive rule.¹²

Even if this regulation did involve a conclusive presumption, it would still be valid. The Court of Appeals below erred in interpreting the decisions of this Court to announce an absolute ban on conclusive presumptions. On the contrary, although this Court was critical of such presumptions some forty years ago, it never went so far as to invalidate a statute on the sole ground that it was a conclusive presumption. Subsequently this and lower courts have moved away from such criticism, and have tended to treat such presumptions as merely creating substantive rules of law.

The early decisions of this Court dealing with conclusive presumptions involved presumptions which had the effect of creating substantive rules of law which themselves were invalid. See e.g., *Marx v. Hawthorn*, 148 U.S. 172 (1893) (conclusive presumption barring proof that due process requirement of notice had not been met); *Bailey v. Alabama*, 219 U.S. 219 (1911) (presumption and other evidentiary rules had effect of making it a crime for a worker to breach a labor contract, for which he had received advance payment, thus

¹²Compare *Bowers v. United States*, 226 F.2d 424 (5th Cir., 1955), upholding a provision of the Agricultural Adjustment Act which stated that all produce not accounted for would be "deemed" marketed as a substantive rule rather than a conclusive presumption.

reintroducing peonage in violation of the Thirteenth Amendment). Later cases approving rebuttable presumptions contrasted them with conclusive presumptions, indicating by way of dicta that the latter variety were disfavored because they precluded a party from offering proof as to some important issue. *Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Luria v. United States*, 231 U.S. 9, 26 (1913); *Manley v. Georgia*, 279 U.S. 1, 6 (1929). In *Schlesinger v. Wisconsin* this Court invalidated a state tax provision similar to that in *Helner*, which provided that all gifts within six years of a taxpayer's death were to be treated as made in contemplation thereof. 270 U.S. 230 (1926). The taxpayer, citing *Mobile* and *Bailey*, invited the Court to invalidate the statute because it was a conclusive presumption. 70 L. Ed. 561. The Court declined the invitation, and invalidated the law on the ground that taxing all gifts within six years of death and exempting all others was "wholly arbitrary." 270 U.S. at 240. Justices Holmes, Brandeis and Stone dissented, urging that the penumbra cases should have been applied. 270 U.S. at 241.

In *Helner v. Donnan*, 385 U.S. 312 (1932), the decision seems to have been based in large measure on the allegedly arbitrary line between gifts more and less than two years from death, relying on *Schlesinger*, and on the fact that heirs were required to pay out of the estate taxes on prior gifts over which they had no control, relying on an earlier decision in *Hooper v. Tax Commission*, 284 U.S. 206 (1931). The Court also criticized the effect of a conclusive presumption, but stopped short of enunciating a general constitutional ban

against them.¹³ To the government's argument that the tax code merely enunciated a substantive rule of law, the court responded that the statute was really a conclusive presumption because it had once been a rebuttable one, and because it was aimed at legislating facts into existence. 285 U.S. at 329.

Heiner, which itself fell short of stating a general ban on conclusive presumptions, marked the high water mark in the Court's opposition to such laws. Two years later in *United States v. Provident Trust Company*, 291 U.S. 272 (1934), the Court indicated that conclusive presumptions were acceptable at least where there were "grounds or policy so compelling in character as to override the generally fundamental requirement of our system that questions of fact must be resolved according to proof," 291 U.S. at 282, a concession to practical necessity which had been explicitly rejected in *Schlesinger* and *Heiner* and which would clearly cover the instant case. Abandoning the position in *Heiner* that irrebutable presumptions were

¹³ "The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor. The young man in abounding health, bereft of life by a stroke of lightning within two years after making a gift, is conclusively presumed to have acted under the inducement of the thought of death, equally with the old and ailing who already stand in the shadow of the inevitable end. And although the tax explicitly is based upon the circumstance that the thought of death must be the impelling cause of the transfer (*United States v. Wells*, *supra* (283 U.S. p. 113)) (the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest, with the result, in the present case and in many others, of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence. 285 U.S. at 327-28."

to be treated as presumptions rather than substantive rules of law, the Court declined to reach the question of whether such presumptions were "in a more accurate sense" rules of substantive law, noting Professor Wigmore's position in support of that analysis.¹⁴

Two years thereafter, in *Blyney v. Long*, 299 U.S. 280 (1936), the Court explained *Schlesinger* as a case involving an arbitrary distinction among *inter vivos* transactions, and made no reference to any problem of irrebutable presumptions therein. 229 U.S. at 291. In *Oyama v. California*, 332 U.S. 633 (1948), Justices Reed and Burton noted that a conclusive presumption "might" be open to serious attack. 332 U.S. at 378, n. 4 (dissenting opinion). Since *Oyama* Circuit Courts in the Fifth, Seventh, Ninth and Tenth Circuits, as well as three district courts have concluded that conclusive presumptions are, and should be treated as, substantive rules of law.¹⁵ The refusal of lower courts in recent years

¹⁴ "Conclusive Presumptions. In strictness, there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." 9 Wigmore on Evidence, §2492 (3d ed.)

¹⁵ *Capital National Bank of Tampa v. Hutchinson*, 435 F.2d 46, 52 (5th Cir., 1970); *Jensen v. United States*, 326 F.2d 891, 895 (9th Cir. 1964); *United States v. 2600 State Drugs*, 235 F.2d 913, 917 (7th Cir. 1956), cert. den., 352 U.S. 841; *Ellis v. Henderson*, 304 F.2d 173, 175 (5th Cir. 1953); *United States v. Jones*, 176 F.2d 278, 288 (9th Cir. 1949); *Shanahan v. United States*, 315 F. Supp. 3 (D. Colo., 1970), aff'd 447 F.2d 1082; *United States v.*

to invalidate presumptions merely because they are conclusive is succinctly explained in *Ellis v. Henderson*, 204 F.2d 173, 175 (5th Cir., 1953). "[W]hat is termed a 'conclusive presumption' as a rule of evidence without logical basis might be constitutionally invalid, but if the rule of substantive law would be constitutional, the form of words used in stating the rule is immaterial."

As Professor Wigmore has suggested, the fatal defect in the early criticisms of conclusive presumptions was the insistence on regarding them as evidentiary rather than substantive rules. To say, for example, that action A is to be regulated and that action B is conclusive evidence of A, is the same thing as regulating B as well as A. It was precisely this equivalency which underlay the criticism of presumptions in *Marx* and *Bailey*, for there the equivalent substantive rule was constitutionally unacceptable. Where the presumption is equivalent to a *valid* substantive rule, it is difficult to see why Congress' choice of words should render unconstitutional a rule constitutional in its effect.¹⁸ These criticisms of conclusive presumptions and the penumbra cases noted earlier are fundamentally inconsistent, and the latter must prevail. To claim that some B transactions may be "innocent" in that they do not involve A's is merely to describe the situation which

Hutchins, 47 F.R.D. 340, 341 (D. Ore., 1969); *United States v. Davis*, 136 F. Supp. 423, 429 (E.D. Mich., 1955). Conclusive presumptions are treated as substantive under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1968), although at least some rebuttable presumptions are procedural. *Maryland Casualty Company v. Williams*, 377 F.2d 389, 394 (5th Cir. 1967) 5 Moore's Federal Practice ¶43.08.

¹⁸Compare *Heiber*, in which "deem" was described as creating an evidentiary rule, with *Bowers*, *supra*, note 12, in which the same term was held to create a substantive rule.

the penumbra cases tell us may be regulated without regard to this overbreadth. It cannot be seriously argued that this Court would have reached a different result in *Facid*, for example, if instead of a literal ban on all industry in certain areas the law had achieved the same thing by prohibiting noxious industry and "deeming" all industry noxious. More is required to invalidate a Congressional or state enactment than a mere inartful choice of terminology.

The criticism of conclusive presumptions in *Heiner* and *Mobile* arose at a time when the financial interests of businessmen and taxpayers were regarded by the court as constitutionally sacrosanct as First Amendment activities. Since that period of economic royalism the Court has properly distinguished between constitutionally protected activities and ordinary commerce. As Justice Stewart wrote in *Shelton v. Tucker*, citing the dissenting opinion in *Schlesinger v. Wisconsin* and one of the penumbra cases,¹⁷ while the Court has remained solicitous of fundamental personal liberty "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional purpose." 364 U.S. 479, 489 (1960). The instant regulation is clearly within that realm of permissible administrative leeway and should be upheld.

¹⁷*Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192 (1912)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and defendant directed to pay plaintiff statutory damages in the amount of one hundred dollars plus the costs of this action together with a reasonable attorney's fee as required by 15 U.S.C. §1640(a)(2).

Respectfully submitted,

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